IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.09.2023

CORAM:
THE HONOURABLE MR. JUSTICE S. VAIDYANATHAN
and
THE HONOURABLE MR. JUSTICE K.RAJASEKAR

W.A. No.2171 of 2023

1 The Deputy Director
Employees State Insurance Corporation
Panchdeep Bhavan
143, Sterling Road
Nungambakkam
Chennai 600 034

2 The Recovery Officer
Employees State Insurance Corporation
Panchdeep Bhavan
143, Sterling Road
Nungambakkam
Chennai 600 034 Appellants

v

1 The Management of SRTC Tech Solutions
Private Limited
2/97, II Floor, Cisons Complex
Montieth Road
Egmore
Chennai 600 008

2 The Branch Manager
HDFC Bank Ltd.
Gopalapuram Branch
Chennai 600 086 Respondents

Writ Appeal preferred under Clause 15 of the Letters Patent challenging the order dated 09.02.2023 passed in W.P. No.27802 of 2017.

For appellants	Ms. G. Narmadha for Mr. G. Bharadwaj
For R1	Mr. T.M. Haroon for M/s. T.S. Gopalan & Co.
For R2	Mr. C. Mohan for M/s. King & Partridge

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JUDGMENT

(delivered by S. VAIDYANATHAN, J.)

This writ appeal impugns the order dated 09.02.2023 passed by a Single Bench of this Court in W.P. No.27802 of 2017.

2 For the sake of clarity, the parties will be adverted to as per their rank in this writ appeal.

3 The facts leading to the filing of this writ appeal are succinctly stated thus:

3.1 The first respondent establishment is covered by the provisions of the Employees State Insurance Act, 1948 (for short "the ESI Act"). While so, the first respondent establishment was issued with proceedings in Form C-18 dated 04.05.2016 demanding payment of contribution for the period November 2009 to November 2010, in response to which, the first respondent

establishment addressed a reply dated 10.06.2016 stating that they were covered only from October 2010 and hence, the demand was not sustainable. It was further stated in the said reply dated 10.06.2016 that the demand was barred by limitation.

3.2 Not satisfied with the first respondent establishment's reply, the second appellant issued an attachment notice dated 23.05.2017 for recovery of Rs.1,64,598/- towards contributions and followed it up with a notice dated 24.10.2017 under Section 45-G of the ESI Act attaching the bank account of the first respondent establishment for a sum of Rs.1,71,298/-, which was also forwarded to the second respondent bank.

3.3 The initial attachment notice dated 23.05.2017 was put to challenge by the first respondent establishment in the writ petition being W.P.No.27802 of 2017. The Single Bench, *vide* order dated 09.02.2023, observed that Form C-18 notice is only an *'ad hoc'* notice, and as such, determination of contributions under Section 45-A of the ESI Act being mandatory, owing to failure on the part of the appellants in determining the contributions under Section 45-A of the ESI Act, the consequential attachment notice dated 24.10.2017 under Section 45-G of the ESI Act is illegal. The Single Bench further observed that in view of the ESI Amendment Act, 2010, which came into force from 01.06.2010, the claim made *vide* Form C-18 dated

04.05.2016 for the period November 2009 to November 2010, is clearly barred by limitation and as a sequel, the consequential action cannot be sustained. Furthermore, the Single Bench did not accept the argument of the learned Standing Counsel for the appellants that the writ petition is not maintainable in view of availability of alternative remedy before the ESI Court under Section 75 of the ESI Act, on the ground that Section 75, *ibid.*, can be pressed into service only in the event of an order passed under Section 45-A, *ibid.* and in the absence of such an order, the first respondent establishment cannot avail of the alternative remedy under Section 75, *ibid.* In short, the Single Bench quashed the initial attachment notice dated 23.05.2017 and allowed the writ petition.

3.4 Thereagainst, the Employees State Insurance Corporation has preferred this writ appeal.

4 At the outset, it is worthwhile to extract Sections 45-A, 45-AA and 75, *ibid.* for the ease of ready reference:

> **"45-A Determination of contributions in certain cases.--**
>
> (1) Where in respect of a factory or establishment no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of Section 44 or any Social Security Officer or other official of the Corporation referred to in sub-section (2) of Section 45 is prevented in any manner by the principal or immediate employer or any other person, in exercising his functions or discharging his duties under

Section 45, the Corporation may, on the basis of information available to it, by order, determine the amount of contributions payable in respect of the employees of that factory or establishment.

Provided that no such order shall be passed by the Corporation unless the principal or immediate employer or the person in charge of the factory or establishment has been given a reasonable opportunity of being heard.

Provided further that no such order shall be passed by the Corporation in respect of the period beyond five years from the date on which the contribution shall become payable.

(2) An order made by the Corporation under sub-section (1) shall be sufficient proof of the claim of the Corporation under Section 75 or for recovery of the amount determined by such order as an arrear of land revenue under Section 45-B or the recovery under Section 45-C to Section 45-I."

45-AA Appellate Authority.-- If an employer is not satisfied with the order referred to in Section 45-A, he may prefer an appeal to an appellate authority as may be provided by regulation, within sixty days of the date of such order after depositing twenty five per cent, of the contribution so ordered or the contribution as per his own calculation, whichever is higher, with the Corporation;

Provided that if the employer finally succeeds in the appeal, the Corporation shall refund such deposit to the employer together with such interest as may be specified in the regulation.

75 Matters to be decided by Employees' Insurance Court.-- (1) If any question or dispute arises as to.--

(1) If any question or dispute arises as to--

(a) whether any person is an employee within the meaning of this Act or whether he is liable to pay the employee's contribution, or

(b) the rate of wages or average daily wages of an employee for the purposes of this Act, or

(c) the rate of contribution payable by a principal employer in respect of any employee, or

(d) the person who is or was the principal employer in respect of any employee, or

(e) the right of any person to any benefit and as to the amount and duration thereof, or (ee) any direction issued by the Corporation under section 55A on a review of any payment of dependant's benefits, or

(g) any other matter which is in dispute between a principal employer and the Corporation, or between a principal employer and an immediate employer, or between a person and the Corporation or between an employee and a principal or immediate employer in respect of any contribution or benefit or other dues payable or recoverable under this Act or any other matter required to be or which may be decided by the Employees' Insurance Court under this Act,

such question or dispute subject to the provisions of sub-section (2A) shall be decided by the Employees' Insurance Court in accordance with the provisions of this Act.

(2) Subject to the provisions of sub-section (2A), the following claims, shall be decided by the Employees' Insurance Court, namely:--

(a) claim for the recovery of contributions from the principal employer;

(b) claim by a principal employer to recover contributions from any immediate employer;

(d) claim against a principal employer under section 68;

(e) claim under section 70 for the recovery of the value or amount of the benefits received by a person when he is not lawfully entitled thereto; and

(f) any claim for the recovery of any benefit admissible under this Act

(2A) If in any proceedings before the Employees' Insurance Court a disablement question arises and the decision of a medical board or a medical appeal tribunal has not been obtained on the same and the decision of such question is necessary for the determination of the claim or question before the Employees' Insurance Court, that Court shall direct the Corporation to have the question decided by this Act and shall thereafter proceed with the determination of the claim or question before it in accordance with the decision of the medical board or the medical appeal tribunal, as the case may be, except where an appeal has been filed before the Employees' Insurance Court under sub-section (2) of section 54A in which case the Employees' Insurance Court may itself determine all the issues arising before it.

(2B) No matter which is in dispute between a principal employer and the Corporation in respect of any contribution or any other dues shall

> be raised by the principal employer in the Employees' Insurance Court unless he has deposited with the Court fifty per cent. of the amount due from him as claimed by the Corporation:
>
> Provided that the Court may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this sub-section.
>
> (3) No Civil Court shall have jurisdiction to decide or deal with any question or dispute as aforesaid or to adjudicate on any liability which by or under this Act is to be decided by a medical board, or by a medical appeal tribunal or by the Employees' Insurance Court."

5 As per Section 45-A, *ibid*, when the records are not produced or maintained, based on the available records with the ESI Corporation, a notice in Form C-18 *(ad hoc)* shall be issued and thereafter, the contribution should be determined based on the records, which means that an opportunity should be given to the employer to submit his objection and dispute the records available with the ESI Corporation. Insofar as Form C-18 (actuals), the documents available with the ESI Corporation, whether they have been produced by the establishment or collected from the establishment, it is the duty of the establishment either to dispute or question the demand made in Form C-18 (actuals).

6 According to Ms. G. Narmadha, learned counsel for the appellants, there is no need for determination of any amount when Form C-18 (actuals) is given, inasmuch as, it is based on the records of the establishment,

whereas, Form C-18 *(ad hoc)* is issued for the purpose of determination of contributions. Further, according to the appellants, the first respondent establishment failed to avail of the alternative remedy to approach the ESI Court invoking Section 75 of the ESI Act.

7 Mr. T.M. Haroon, learned counsel for the first respondent establishment submitted that whether it is Form C-18 (*ad hoc*) or Form C-18 (actuals), there shall be a determination under Section 45-A of the ESI Act and thereafter, if the establishment is aggrieved, it is open to them to either prefer an appeal under Section 45-AA, *ibid.*, within a period of 60 days or to approach the ESI Court under Section 75, *ibid.* He referred to the judgment of a Division Bench of this Court in **Madras Hotel Ashoka (Pvt.) Ltd. v Regional Director, ESIC, Madras v Regional Director, ESIC, Madras (2004) 2 LLN 1071**, wherein, it has been held that an order under Section 45-A has to be passed. He placed further reliance on a Single Bench order of this Court in **Aarthi Enterprises v The Regional Director, ESIC and 2 others (W.P. No.12906 of 2021 decided on 28.06.2021)** passed by one of us (SVNJ), wherein, it has been held that after adjudication, it is mandatory on the part of the ESI Corporation to pass an order under Section 45-A, *ibid.,* and if a Section 45-A order is challenged when Form C-18 (actuals) has not been obtained, this Court has held that Form C-18 is only a notice and cannot be taken as one of determination.

8 Mr. Mohan, learned counsel representing M/s. King & Partridge, learned counsel on record for the second respondent bank submitted that after the order passed by the Single Bench allowing the writ petition, the amount of Rs.1,71,298/- that was attached, has been released to the first respondent establishment.

9 Heard both sides and perused the materials available on record.

10 The ESI Corporation is adopting two methods of recovering contributions from the employer, one is by issuing Form C-18 (*ad hoc*) and the other is by issuing Form C-18 (actuals). Section 45-A of the ESI Act extracted *supra*, deals with the situation of a claim made in Form C-18 (*ad hoc*) and not with regard to Form C-18 (actuals). It is true that this Court, in **Aarthi Enterprises** (*supra*), has held that determination is required. But, be it noted, in the said order, this Court has not considered whether Section 45-A order should be passed when actuals are demanded. What has been held in the said order is that if the establishment is not satisfied with the order passed under Section 45-A, *ibid.*, an appeal can be preferred before the appellate authority under Section 45-AA, *ibid.*, within a period of 60 days. In any event, we are of the view that determination is required only if a notice in Form C-18 (*ad hoc*)

is issued and not when Form C-18 (actuals) is issued. It is open to the establishment to challenge Form C-18 (actuals), even without determination, before the ESI Court, as it is based on the records produced by the establishment or available with the ESI Corporation with regard to actuals payable by the establishment.

11 In **Madras Hotel Ashoka (Private) Ltd.** (*supra*), the Division Bench has considered the issue as to when an order under Section 45-A, *ibid.*, needs to be passed. Be it noted, a concession on a legal issue may not be a binding precedent. The ESI Corporation is expected to follow the limitation prescribed under the ESI Act and claim contributions well within the time limit prescribed. As the first respondent establishment has got a remedy under Section 75 of the ESI Act before the ESI Court and since Section 75(g), *ibid.*, is very wide to cover any type of dispute, we are of the view that without exhausting the said remedy, the writ petition is not maintainable.

12 Thus, leaving all the factual issues open to the parties, including the issue of limitation, if any, excluding the period during which the writ petition was pending, we hold that it is open to the first respondent establishment to approach the ESI Court within a period of three months from the date of receipt of a copy of this order. In case, they have a longer period of

limitation, it is open to them approach the ESI Court within such time.

13 Superadded, a reading of the notice in Form C-18 dated 04.05.2016 makes it clear that while determining the actuals, the first respondent establishment was required to appear before the authority within 15 days from the date of receipt of the notice, failing which, it was stated that action will be initiated. In response, a reply dated 10.06.2016 has been addressed by the first respondent establishment. Though it has been contended by the learned counsel for the appellants that the reply has not been given within 15 days, we are of the view that when the first respondent establishment has not disputed the amount, it is open (to whom) to come to the conclusion that Form C-18 (actuals) can be questioned before the ESI Court. Futher, though the first respondent establishment has given their reply beyond the period of limitation mentioned in the notice, we are of the view that the delay can be condoned, more so, in the light of the fact that the order impugned in the writ petition has been issued only on 23.05.2017. If the period of one month is to be construed as delay on the part of the first respondent establishment to reply, the ESI Corporation has taken nearly a year to issue the communication dated 23.05.2017.

S. VAIDYANATHAN, J.
and
K. RAJASEKAR., J.

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14 In view of the above discussion, the order passed by the Single Bench is set aside and we hold that determination under Section 45-A, *ibid*., is required in case of Form-C 18 (*ad hoc*) and not in case of Form-C 18 (actuals).

This writ appeal stands disposed of in the above terms. Costs made easy.

(S.V.N., J.) (K.R.S., J.)
20.09.2023

cad

To

The Branch Manager
HDFC Bank Ltd.
Gopalapuram Branch
Chennai 600 086

W.A. No.2171 of 2023